

DEC 23 2005

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

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UNITED STATES DISTRICT COURT  
NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,	)	Criminal Case No. <u>04-00009</u>
	)	
Plaintiff,	)	GOVERNMENT'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT'S
v.	)	MOTION FOR RELEASE PENDING
	)	APPEAL
PEDRO Q. BABAUTA,	)	
a/k/a "Pete,"	)	Date: January 5, 2006
	)	Time: 9:00 a.m.
	)	
Defendant.	)	
	)	
_____	)	

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Leonardo M. Rapadas, United States Attorney, and Timothy E. Moran, Assistant United States Attorney, and hereby files its memorandum in opposition to the defendant's motion for release pending appeal.

I. STANDARD FOR BAIL PENDING APPEAL

Title 18, United States Code, § 3143(b) requires the Court to detain a defendant pending determination of his appeal except where the Court finds "by clear and convincing evidence that the defendant is not likely to flee or pose a danger to . . . the community ... and that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (i) reversal, (ii) an

1 order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced  
 2 sentence to a term of imprisonment less than the total of the time already served plus the expected  
 3 duration of the appeal process.”

4 The Ninth Circuit imposes a four part test under this statute: (1) that the defendant is not likely to  
 5 flee or pose a danger to the community; (2) that the appeal is not for delay; (3) that the appeal raises a  
 6 substantial question of law or fact; and (4) that if the substantial question is determined favorably, that  
 7 decision is likely to result in a reversal or order for a new trial of all counts on which imprisonment has  
 8 been imposed. United States v. Handy, 761 F.2d 1279, 1283 (9<sup>th</sup> Cir. 1985). The Government does not  
 9 contest the defendant’s assertions that he is not a flight risk or danger to the community or that the  
 10 appeal is not for delay. Accordingly, the most pressing issue for consideration is whether the  
 11 defendant’s appeal will raise substantial questions of law or fact. Handy defines a “substantial question”  
 12 as one that is “fairly debatable or fairly doubtful.” Id. (quotations and citations omitted).

## 13 II. THE DEFENDANT DOES NOT RAISE SUBSTANTIAL ISSUES OF LAW OR FACT.

14 The defendant is not entitled to be released from custody pending appeal because he does not  
 15 raise any substantial issues of law or fact and therefore does not meet the requirements of 18 U.S.C. §  
 16 3143(b).

### 17 A. The Defendant Does Not Raise An Issue As To His Alleged Entitlement To A New Trial 18 On Count Five On A “Duty To Report” Theory.

19 The defendant contends that he is entitled to a new trial on Count Five because the evidence at  
 20 trial supports a violation of 18 U.S.C. § 1001 only under a “concealment” theory, not for false reporting,  
 21 and that therefore the jury should have been instructed to find that the defendant had a duty to report  
 22 information not submitted to the CNMI DEQ. This combined argument of fact and law does not raise a  
 23 substantial issue of law or fact. The jury instruction required the jury to find that the document used by  
 24 the defendant contained a false statement. The Court properly did not further define the term false,  
 25 because it is a “common term[] readily understandable by the jury.” United States v. Hicks, 217 F.3d

1 1038, 1045 (9<sup>th</sup> Cir. 2000) (district court properly refused to define the term “false”). Because that  
2 instruction properly defines the criminal conduct here and the jury had sufficient evidence to make its  
3 finding, the defendant’s point is misplaced both factually and legally.

4 First, with regard to the sufficiency of the evidence in Count Five, the jury had ample evidence  
5 from which to find that the defendant’s statement was *false*, without regard to concealment. The jury  
6 had Exhibit 1, which was the statement implicated in Count Five, and could determine for itself whether it  
7 considered the information contained therein to be false. Significantly, the jury heard evidence  
8 concerning the falsification of test results from February 13, 27, and 28, 2003. In addition, it could have  
9 reasonably inferred that the test results for February 28 should have been listed as repeat test results, not  
10 original test results, and found falsity on that basis. This is consistent with what the Government argued  
11 to the jury: “You’ll see that these are the documents that were submitted by CUC, by the defendant who  
12 ran the lab, and you’ll see the false statements *in there*.” (Decl. of [Defense] Counsel dated Dec. 4,  
13 2005, Ex 1, Tr. at 491, lines 21-23 (emphasis added).)

14 Second, there is no legal basis for the defendant’s request for an additional jury instruction on  
15 Count Five. It is undisputed that the defendant caused Exhibit 1 to be submitted, so the case was not  
16 submitted under a theory that the defendant should have been submitting forms that he did not. Thus,  
17 the false statement instruction that the Court gave would have been the same whether under a  
18 “concealment” or “false reporting” theory; in other words, there are not two different “statutory  
19 violations.” See Ninth Cir. Model Jury Instr. § 8.66; United States v. Milton, 602 F.2d 231, 233 (9<sup>th</sup> Cir.  
20 1979) (approving false statements instruction under § 1001). Moreover, in finding that Exhibit 1  
21 contained a false statement, the jury must first consider whether the information was literally true and  
22 could have returned a verdict of not guilty on that basis. See Torres-Rodriguez, 930 F.2d 1375, 1388  
23 (9<sup>th</sup> Cir. 1991) (court should examine jury instructions as a whole).

24 Finally, the defendant cannot meet the four pronged test under Handy even if the Court  
25 determines that a substantial question of law and fact exists as to the duty to report. A favorable

1 decision on the substantial issue must be likely to result in a new trial “*on all counts* on which  
2 imprisonment has been imposed.” Handy, 761 F.2d at 1283. The Court imposed sentences on both  
3 Counts Four and Five to run concurrently, while this alleged issue pertains only to Count Five.

4 B. The Defendant Is Not Entitled To A New Trial On Counts Four And Five For A Lack Of  
5 Jurisdiction.

6 The defendant asserts that the Court erred by taking the factual issue of jurisdiction away from  
7 the jury, which should have decided it by a reasonable doubt. The defendant does not raise a substantial  
8 issue of fact or law because he mistakes the Court’s ruling and overestimates its effect on the case. The  
9 Court’s ruling did not eliminate all factual elements of jurisdiction, specifically issues which should  
10 have been reserved to the jury. The Court’s ruling addressed solely the issue of the EPA’s grant of  
11 primary authority to the CNMI Division of Environmental Quality (“DEQ”), which was a legal matter  
12 susceptible to a ruling of law. The Government still had to prove at trial, and did prove with respect to  
13 Counts Four and Five, that the defendant submitted materially false documents to the DEQ and that  
14 those submissions were material to the activities of the DEQ. See United States v. Facchini, 874 F.2d  
15 638, 641 (9<sup>th</sup> Cir. 1989) (*en banc*).

16 The Government had requested that the Court find as a matter of law that the EPA had  
17 jurisdiction over documents submitted to DEQ under the Safe Drinking Water Act (“SDWA”) pursuant  
18 to the EPA’s grant of primary authority – in essence, that the DEQ stood in the shoes of the EPA. The  
19 EPA’s grant of primary authority took place within its regulatory authority pursuant to 42 U.S.C. § 300g-  
20 2(a) and 40 C.F.R. 142.10. The Court took notice of prior legal actions, as documented in the Federal  
21 and Commonwealth Registers.

22 The cases cited by the defendant actually support this position. The defendant cites a line a cases  
23 holding that false statements that go to an “agent” of the federal government may be actionable under §  
24 1001. See, e.g., United States v. Green, 745 F.2d 1205, 1208 (9<sup>th</sup> Cir. 1984); United States v. Kraude,  
25 467 F.2d 37, 38 (9<sup>th</sup> Cir. 1972). The Government was required to prove that the defendant submitted

1 statements to the DEQ. As a matter of law, the Court correctly found that the DEQ's "agency" took  
2 places pursuant to a regulatory grant of authority, instead of by contract.

3 Second, United States v. Gomez, 87 F.3d 1093 (9<sup>th</sup> Cir. 1996) (defendant convicted of arson of a  
4 rental apartment building involved in interstate commerce) demonstrates a similar division of  
5 labor between the jury's fact finding and the court's rulings of law. Although the jury found the  
6 jurisdictional element that the building was involved in interstate commerce, the judge instructed the  
7 jury *as a matter of law* "that rental properties are by definition used in interstate commerce." Id. at 1097.  
8 The Government never introduced any evidence regarding a connection to interstate commerce because  
9 of the judge's legal ruling. Id. at 1094.

10 Accordingly, the defendant has not shown that there is any substantial issue of law or fact with  
11 regard to the proof of jurisdiction.

12 C. There Is No Substantial Issue As To The Sentence's Reasonableness.

13 The defendant does not raise a substantial issue as to the sentence's reasonableness. Although  
14 United States v. Booker permits a defendant to challenge a sentence for reasonableness, it recognizes in  
15 the absence of a mandatory guidelines system the district court's "broad discretion" in sentencing. 543  
16 U.S. —, 125 S. Ct. 738, 750 (2005). Although the Court exceeded the range of imprisonment under the  
17 *advisory* Sentencing Guidelines, the Court was free to disregard that range so long as it stayed within the  
18 statutory maximums. Id. at 757. Furthermore, the Court sentenced the defendant to only 20% of the  
19 time requested by the Government.

20 Likewise, there is no issue as to the reasonableness of the Court's fact finding underlying its  
21 determination of the advisory Guidelines level. The Court find facts under a preponderance of evidence  
22 standard. See United States v. Ameline, 409 F.3d 1073, 1086 (9<sup>th</sup> Cir. 2005) ("the district court must  
23 continue to apply the appropriate burdens of proof, consistent with Howard"); United States v. Howard,  
24 894 F.2d 1085, 1090 (9<sup>th</sup> Cir. 1990) ("party bearing the burden of proof will be required to meet a  
25 'preponderance of the evidence' standard"). There was more than sufficient evidence available to the

1 Court from trial; in addition, the Government introduced additional testimony from Special Agent Gary  
2 Guerra at the sentencing hearing. Accordingly, the defendant does not raise a substantial issue of law or  
3 fact as to the sentence's reasonableness.

4 Finally, the defendant's argument regarding irreparable harm is moot since he cannot show a  
5 substantial issue of law or fact. In any event, LaGiglio is inapposite because in that case, due to the  
6 Seventh Circuit's decision in United States v. Booker requiring a jury finding of sentencing  
7 enhancements and under the then mandatory guidelines system, the defendant's sentence became capped  
8 at less time that she would have served. 384 F.3d 925, 926 (7<sup>th</sup> Cir. 2004), citing United States v.  
9 Booker, 375 F.3d 508 (7<sup>th</sup> Cir. 2004), remanded, 543 U.S. —, 125 S. Ct. 738 (2005). In this defendant's  
10 case, there is no "cap" on sentence beyond the statutory maximum of 10 years, which the defendant will  
11 not exceed while waiting for his appeal to be resolved. Accordingly, the only deadline is the exhaustion  
12 of the defendant's one year sentence (although the issue is moot because the defendant does not raise a  
13 substantial issue of law or fact with regard to the sentence).

14 III. CONCLUSION

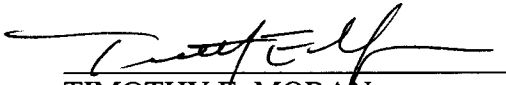
15 For the reasons stated above, the Court should deny the defendant's motion for bail pending  
16 appeal.

17 Dated: December 23, 2005  
18 Saipan, CNMI

19 Respectfully submitted,

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22 Districts of Guam and the NMI

23 By:

24   
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